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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

M.L. et al., Petitioners, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; SAN FRANCISCO HUMAN SERVICES AGENCY, et al., Real Parties in Interest.	A145269 (San Francisco Superior Unified Family Court Juvenile Division Case No. JD143242)

Petitioners, M.L. and S.L. the parents of minor, Melinda L,[1] seek review of the juvenile court's May 20, 2015 order in which the court terminated parents reunification services and set the matter for a Welfare and Institutions Code section 366.26 hearing.[2] Parents contend, inter alia, that the court erred in finding that return of the minor to parents would create a substantial risk of detriment, that there was no substantial probability that

[1] Father and minor daughter share the same initials, M.L. Thus we will refer to father as "M.L." and to the minor as "Melinda L," "daughter," or "minor" throughout this opinion.

[2] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

the child could be returned within the next six months, and that the Agency provided reasonable services to parents. For the reasons given below, we deny their petitions.

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2014 the San Francisco Human Services Agency (Agency) filed a petition, pursuant to section 300, subdivisions (a), (b), (g) and (j), alleging that S.L.'s untreated mental health issues, M.L.'s alcohol abuse, and parents' ongoing domestic violence, placed the minor at risk. According to the contemporaneously filed detention report, the parents previously had been referred to Child Protective Services 23 times. The report noted that mother and father were currently receiving reunification services in ongoing dependency matters involving their three older children who were in placement with a relative. The report indicated that parents were the subject of several prior referrals to Child Protective Services, including two referrals involving the parents and two of their older children from June 15, 2005 through August 5, 2005 and October 31, 2006 through April 24, 2007. Mother refused family maintenance services with respect to each of these referrals. In addition, the Agency provided counseling services to the family sometime between August 31, 2009 through October 7, 2010, as a result of a referral involving one of the older children.

The report provided a description of parents' recent conduct which gave rise to the filing of the July Petition. Mother reported that M.L. was drinking vodka from his water bottle during a June 2014 visit with their three older children at Seneca in Fairfield.[3] The Agency alleged that M.L. had a serious drinking problem which prevented him from effectively caring for minor. M.L. had a conviction for driving under the influence, his drinking caused judgment lapses and, on more than one occasion, M.L. drove a vehicle in which S.L. and the minor were passengers, while drunk. During a June 30, 2014 visit between the older siblings in Fairfield and parents, Seneca staff smelled alcohol on M.L.'s breath and confronted him. He did not deny staff's contention that he had been drinking.

[3] The July 2014 detention report indicated that the minor's three older siblings were "in placement." Until July 2014, they had been cared for by their maternal grandmother, when they moved to the paternal aunt's home.

Staff instructed S.L. to drive their vehicle home due to M.L.'s intoxication. Later, S.L. reported to Seneca staff that M.L. passed out while they were on their way home. M.L. refused the agency's request that he enroll in a substance abuse treatment program, asserting that he had completed drug treatment in the past and no longer had any problem. At the suggestion of a domestic violence specialist, he did, however, agree to attend a Men's Support Group.

S.L. made several statements during the June 2014 visit that reflected she was experiencing paranoid delusions. For example, she became angry when M.L. splashed water on the children to cool them off in 100 degree heat because "she believed he was attempting to wash off the holy oil with which she had anointed them." She also stated that she is "the blood of the lamb, and her husband is Jesus," and that "M.L. was possessed by the devil, who made him drink, and that she tried to beat the devil out of him." S.L. expressed concern that M.L. was going to drown their daughter. The report also described an incident where S.L. brought a cooked chicken to the Seneca facility,[4] and requested that it be tested to prove that M.L. was trying to poison her. The family therapist reported that S.L. disclosed bizarre thoughts with religious overtones during their session, leading the therapist to encourage her to undergo psychiatric evaluation: S.L. refused.

The Agency arranged a team decision-making meeting in which parents participated. At the conclusion of the meeting, parents agreed to a safety plan for their daughter which provided for routine health and safety checks of their home by the Agency. Parents, however, failed to comply with the plan. On one occasion when the Agency arrived at parents home to perform the safety check, no one answered the door. In addition, mother took the minor to Bakersfield to be with the man she considered to be the child's true father precluding safety checks while she was away. The Agency managed to arrange an emergency courtesy check of the residence in Bakersfield through another county's social services agency and, ultimately, arranged for the return of the minor to the

[4] Seneca is a community-based agency providing comprehensive services for children and families experiencing high levels of trauma and who are at risk for family disruption or institutional care. (http://www.senecafoa.org, August 31, 2015.)

Bay Area. The report described several incidents of domestic violence involving parents. S.L. informed the agency that M.L. had threatened to kill her and the baby and that she did not feel safe around him, especially when he was drinking. During a family therapy session, the parents had an altercation in front of two of the children. When the therapist intervened, S.L. abruptly left the session. M.L. reported that S.L. was becoming increasingly violent and showed the therapist where she had bitten him. He also reported that once, while he was driving S.L. and the child, S.L. punched and assaulted him.

On July 6, 2014, the police were called to the parents' home due to domestic violence between M.L. and S.L. S.L. was arrested for assaulting her husband. M.L. on the other hand, stated that he was fearful of S.L., especially after she was released from jail for assaulting M.L. without any medication. Because of allegations that another man was the minor's father, M.L. requested paternity testing.

On July 10, 2014 M.L. sought a restraining order against S.L. He alleged that S.L. had attacked him twice, hitting him in the eye both times. M.L.'s mother called the police, and S.L. was arrested. In addition, M.L. claimed that about two months before the July 6th assault S.L. had punched holes in the walls of their house and had ripped up clothing.

The minor was temporarily detained on July 10, 2014. On July 14, 2014, the juvenile court adopted its temporary detention findings as its order and granted both parents supervised visitation.

On July 23, 2014, the court recognized M.L. as the minor's presumed father. The next day M.L. withdrew his request for a restraining order. The juvenile court then set the matter for a settlement conference on jurisdiction and disposition for August 28, 2014.

In advance of the scheduled settlement conference, the agency submitted its disposition report. The Agency recommended that the child be placed in foster care and that both parents be provided with reunification services. The report noted that the Indian Child Welfare Act (ICWA) did not apply. Regarding M.L., the Agency stated that he required services to address his substance abuse and domestic violence issues. It also requested that M.L. refrain from driving with a suspended license to avoid putting himself and others at risk. Regarding S.L., the Agency recommended that she undergo a

psychological evaluation, remain under the care of a qualified mental health professional and comply with any recommendations to take psychotropic medications, notwithstanding her refusal to do so. S.L. was to participate in a group to address domestic violence issues. Finally, if the parents were living together, they were to engage in marital counseling to address on-going parenting/relationship issues that adversely affected their ability to parent.

The report also indicated that neither parent had been forthcoming regarding the problems they were facing. Both parents denied any current domestic violence or fighting in their relationship stating that they were on good terms with one another and minimized the severity of S.L.'s psychological problems.[5]

The parents reported that they were living together in a townhouse; S.L. was unemployed; M.L. reported working in a warehouse, although he declined to provide the Agency with a copy of his paystub for employment verification. The Agency encouraged M.L. to enter an alcohol and drug detoxification program, but he resisted doing so for fear it would jeopardize his employment opportunities and job search.[6] The report concluded that returning the child to the parents was not in her best interests due to her parents' domestic violence issues, M.L.'s drinking, and S.L.'s mental health issues.

At the conclusion of the initial settlement conference, the juvenile court entered the following orders: S.L. was to undergo a psychological evaluation and comply with any

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[5] S.L. had been diagnosed with depression in 2004. When she was approximately 13 years old she had been a ward of the California Youth Authority, at which time she was diagnosed with post-traumatic stress disorder. She had multiple suicide attempts and engaged in "self-harming" behaviors as a child. She had a history of homicidal ideation, anger control issues, and multiple psychiatric hospitalizations while in the Youth Authority. During the dependency case for her three older children, she reported that she had been prescribed psychotropic medications, which she took "off and on." She indicated that she was presently unwilling to go back onto the psychotropic medications, but would agree to a psychological evaluation and, even, to resuming her medication as part of an agreement for additional services regarding her older three children. Recently, she had suffered both auditory and visual hallucinations.

[6] It is unknown if his claim that he was employed at a warehouse at that time was untrue or if he was searching for a better job.

recommendations reflected in the report; M.L. was to attend outpatient (substance abuse) treatment. The Agency was to verify that both parents were attending their domestic violence programs. The matter was then continued to October 7 for further settlement conference.

In advance of the October 7 settlement conference, the Agency filed an addendum report. The addendum report noted that parents were living together in their townhome, but neither was employed. M.L. had begun both relapse prevention and anger management classes. He was also meeting with his primary case manager through the African-American Healing Center Program at least twice per month. S.L. had completed her psychological evaluation/assessment, although the results were not yet available. She had begun weekly individual therapy and was poised to sign a treatment plan. Parents were visiting their daughter for two, three-hour sessions per week. Despite these positive signs, the Agency's prognosis regarding the parents remained guarded because it lacked sufficient information to complete a definitive assessment. Mother had only recently provided a signed release to enable the Agency to verify her participation in services and father had not provided one. The Agency had not received any drug test results for M.L., in part, because the Agency was in "transition" with the testing entity. Father continued to drive even though his license was suspended. The report concluded, "It is true that the parents are engaging in services at this time, as accounted by the providers. However, their case history has suggested that the parents' engagement in services [has] not translated into sustaining behavioral changes."

The settlement conference scheduled for October 7 was continued. On October 23, 2014 the parties settled the jurisdictional issues, agreeing that there was a factual basis to establish jurisdiction on the following bases: (1) S.L.'s mental health; (2) M.L.'s alcohol abuse; and (3) the parents' joint domestic violence. A contested disposition hearing was set for November 12, 2014.

There is some confusion among the parties as to what happened next. According to M.L., the parents contested disposition hearing regarding the minor, scheduled for November 12, was continued to December 12th. It appears, however, that the juvenile

court consolidated the minor's contested disposition hearing with the older siblings' contested 12-month review and heard both matters jointly on November 19.[7] [8] M.L., now incarcerated, was transported to the November 19th hearing. Following the contested hearing (and a section 388 petition),[9] the court ordered that the minor (and her older siblings) remain in foster care and that the Agency continue to provide reunification services to parents. The court observed that the parents' progress in achieving the case plan objectives had been moderate. Parents were ordered to comply with each child's visitation plan, including therapeutic visitation, if applicable. The court delegated discretion to the Agency to allow parents to have unsupervised visits, if appropriate, with S.L. and M.L., upon his release from jail. The December 12 hearing date was vacated. Thereafter, on November 21, 2014 the court entered several additional orders pertaining to the parents. Specifically, the juvenile court ordered that S.L. remain in mental health treatment and comply with her mental health provider's recommendations in order to gain skills for mood stabilization and emotional regulation so as to be able to "effectively attune to and interact with her children." She was to engage in an interpersonal violence support group and refrain from physically disciplining the children. If the parents lived together they were to participate in approved marital counseling and refrain from domestic violence. Regarding M.L., the juvenile court ordered that he complete a substance abuse assessment and follow through with its recommendations, refrain from driving with a suspended license, and participate in an interpersonal violence support group. M.L. was to be assessed for substance abuse and was to comply with any resulting recommendations. The court reiterated that parents were to visit their children and comply with any therapeutic visitation requirements, if applicable.

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[7] The Agency explained that due to an apparent clerical error, the juvenile court used a form minute order which had been designed for a review hearing.

[8] Despite the fact that the juvenile court considered the siblings and the minor's case together, the juvenile court was careful to issue a separate ruling concerning the minor. The instant writ petition deals exclusively with the minor.

[9] The section 388 petition does not appear in our record; rather, we are informed of it by M.L.

On December 22, 2014, S.L. filed a parental notification of Indian status. The notice indicated that the minor is or may be a member of or eligible for membership in a federally recognized Indian tribe — the Cherokee — primarily, but not exclusively, through M.L. By March 11, 2015 the Cherokee Nation, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Eastern Band of Cherokee Nations had all responded that the minor was not an "Indian Child" through their lineages.[10] Notwithstanding the unanimous responses from these tribes that the minor was not an "Indian Child," the juvenile court did not enter an order reflecting the non-applicability of ICWA.

On March 24, 2015 the Agency submitted an ex parte application for an order shortening time for the court to hear a section 388 petition to terminate reunification services and visitation for all four siblings, including the minor. Parents' section 388 petition seeking to reduce visitation with the minor to three hours per week and to combine the visits with her older siblings was pending at the time the Agency filed its 388 petition.

Ms. Roe, the social worker assigned to the minor's case, submitted a six-page report in support of the Agency's section 388 petition. Her March 24th report indicated that the minor and her three older siblings were now placed in the home of the paternal aunt of two of the older siblings. Arrangements had been made for weekly therapeutic visitation in Oakland where the parents lived. Because the paternal aunt lived in Stockton, the parents agreed to confirm their visits 24 hours in advance and to arrive two hours early to avoid the necessity of transporting the children if visits were cancelled. Roe's report also stated that S.L. moved to Sacramento for the months of December and January and had not visited with the children during some of that time. In addition, S.L. had canceled or missed three of the weekly visits in the month prior to the March filing of the section 388 petition which resulted in detrimental effects to the children. Between January 24, 2015

[10] Nothing in the record indicates what the juvenile court's protocol was in determining that it should notify the particular bands it did. Nonetheless, petitioners do not argue that the notification process was in any way deficient; thus, we presume its adequacy.

and March 14, 2015, five visits were cancelled, four of which were cancelled due to the unavailability and/or actions (including failing to confirm) by one or both parents.

The March Report also noted that in January 2015, S.L. had two separate police incidents, resulting in her involuntary detention at San Francisco General Hospital.[11] Following her second involuntary hospitalization she planned to receive monthly injections to treat her psychotic symptoms.

M.L. had been arrested and booked into county jail on October 3, 2014 for armed robbery and assault with a deadly weapon and was released on February 25, 2015. M.L. visited with the minor on two occasions between his release from custody on February 25, 2015 and the March 25, 2015 filing of the section 388 petition. The older children's case was approaching 24-month review and there was no indication that the therapeutic visitation could be reduced to a lower level of supervision.

The report concluded: "Since the four children's placement [with the caregiver], they have made tremendous progress in their school and behaviors. The caregiver is consistently committed to the children's best interests and needs. She surrounds their life with consistent parenting, stability and enriched activities so they can flourish and thrive. [The caregiver] wants to become the three older children's legal guardian an adopt [the minor]. While the older children have formed connections with the mother [and M.L.] after almost 24 months of reunification with their parents, they deserve stability and a carefree childhood. They should not be regularly tested about their allegiance between the parents or the caregiver because these three individuals all love them. However, both [S.L. and M.L.] are in no position to care and provide for them at this time as demonstrated by their ongoing personal struggles and problems over the course of this dependency. It is, therefore, the Agency recommendation that both [family reunification] services for [M.L. and S.L.] be terminated and visitation be stopped. The caregiver stated that she is willing to facilitate visitation for the mother and [M.L.] when they have successfully addressed their personal marital problems and mother's mental health is stable."

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[11] S.L.'s first involuntary commitment involved her attempt to throw oil on a passerby and set her on fire. The second involved S.L. attempting to set the house on fire.

On April 29, 2015 the Agency filed an addendum report in support of a combined section 366.25, 24-month permanency review hearing for the older siblings and a section 366.21 six-month review for the minor. The addendum, also authored by social worker Roe, provided additional facts beyond those set forth in her March 24th report. Roe's addendum report noted that M.L. was on three-years' probation, after having served time for armed robbery and assault. M.L. reported that he was sober and attending AA and NA meetings. He completed a therapeutic assessment and planned to attend weekly individual therapy. S.L. was reportedly taking her medication and had not had any further hospitalizations. The parents had completed a domestic violence support group program and were attending a weekly support group. However, on April 6, 2015, S.L. contacted the worker, saying that she felt threatened by M.L. Roe referred her to a domestic violence liaison assigned to their case, but S.L. later called back to say everything was fine and she no longer required assistance. The Agency referred parents to couples' therapy. The Agency also obtained additional financial support for the parents via CalWorks and provided transportation funds so they could visit the children in Oakland and assisted S.L. in her effort to obtain SSI disability benefits.

Regarding visitation, the April report indicated that parents had weekly visits with minor and her older siblings for the three successive weeks prior to the filing of the addendum report. The visitation supervisor, however, reported inappropriate behavior by the parents during visits; making phone calls during visits, giving the children their phone numbers to facilitate calls to parents, and being alone with the children when visits were supposed to be supervised. The children's caregiver, reported that when the children returned from their visits with the parents, they were anxious, defiant, and verbally aggressive towards one another. The report reiterated the worker's positive assessment of how the children were doing in the placement.

The Agency recommended that reunification services be terminated and that the court select a permanent plan of legal guardianship for the older three children and adoption for the minor. In particular, the Agency expressed its reservations concerning the probability of the minors being returned to the parents, due to the parents' continuing

mental health and domestic violence issues. "The recent incarceration of [M.L.] [S.L.'s] hospitalizations regarding her mental health, ongoing domestic violence and lack of stable housing continue[] to pose a safety concern that warrants the need for dependency." In addition, the Agency was concerned about the parents' "inconsistent" visitation, which still required therapeutic-level supervision/intervention after 24 months.

A combined 24-month/six-month contested review hearing was held on May 19, 2015. The Agency withdrew its section 388 petition, electing to proceed on its March 24th and April 29th reports. The agency social worker's testimony reiterated the Agency's recommendation that the parents receive no further reunification services and request that the court set a section 366.26 hearing remained unchanged. The worker expressed concern for the safety of the minor and her older siblings if they were returned to parents' care. In particular, she identified mother's involuntary hospitalizations, her short course with newly prescribed medication, the parents' housing situation (including reports of conflict between S.L. and the maternal grandmother, who resided in the house), the domestic violence between parents, and the Agency reports filed with the court documenting parents failure to fully engage their opportunity for therapeutic supervised visitation with the children as the bases of her concern. The social worker conceded that the court had not "mandated" that S.L. take medication (the oral testimony neglected to reflect that S.L. was required to take medications, including psychotropic medications, if recommended by her mental health professional/psychiatrist). She also confirmed that the Agency had been unable to provide mother with weekly psychiatric visits, as recommended in the psychological evaluation.[12] Furthermore, the worker acknowledged that mother had begun taking

[12] The recommendation regarding psychiatric visits were included in S.L.'s psychological evaluation, which was completed on October 3, 2014. As of October 7, the Agency had not yet received that report. On November 21, 2014, the juvenile court issued an order allowing S.L.'s therapist to receive a copy of that report. The psychological evaluation, however, is not included in our record. Notwithstanding the apparent recommendations for weekly psychiatric treatment referenced in the evaluation, there is no court order *requiring* that S.L. have weekly visits with a psychiatrist (as opposed to another qualified mental health professional). The Agency did arrange for S.L. to have weekly psychotherapy.

psychotropic medications after her involuntary hospitalizations (including monthly injections), and that S.L.'s mental stability was improving. Moreover, S.L's therapist and M.L. both noted an improvement in her.

M.L. testified that he completed the required parenting and domestic violence classes, that visitation with the minor and her siblings was ongoing, as was his individual therapy and couples' therapy with mother, and he was attending AA meetings. The worker confirmed that the father's sobriety facilitated his progress in therapy. M.L. conceded that the couples therapy with S.L. had only begun one week before the hearing. He explained, however, that parents had requested that couples therapy begin earlier but the request was placed on hold until they addressed other issues in their case plan such as M.L.'s release from jail, improvement in S.L.'s mental stability, and M.L.'s obtaining a job. M.L. testified that he was employed in a furniture warehouse. M.L. also testified that on several occasions the Agency was unable to provide parents with transportation funds to allow them to travel to the visitation site. On these occasions, parents were required to get to the visitation site independent of any Agency assistance. M.L expressed his desire that all of the children, including those who were not his biological children, be returned to their home. On cross-examination, M.L. conceded that his participation in individual therapy[13] had been sporadic, with periods of non-participation. When asked to estimate the number of times he attended individual therapy in the last year and one-half, M.L. indicated "approximately 14 to 20 sessions."[14] S.L did not testify on her own behalf, but did request

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[13] The juvenile court did not specifically order father to participate in therapy. Rather, he was required to complete a substance abuse evaluation and follow through with its recommendations, to engage in an interpersonal violence support group, and, if he was living with mother, to participate in marital counseling. Regardless, at the African-American Healing Center, beginning in August 2014, he had been engaged in a multi-faceted program consisting of classes, groups, and one-on-one counseling. Presumably, his therapy was designed to address issues related to his substance abuse and use of violence.

[14] The record does not allow us to say with certainty how many sessions M.L. ought to have attended in this time frame. However the record reflects that there was a six-month period when M.L. had no contact with his therapist — which required the Agency to issue a new referral. Thus his absences from therapy were substantial.

that three exhibits, addressing her therapeutic progress, be admitted into evidence. Her request was granted.

At the conclusion of the Agency's case, S.L., joined by M.L., moved, pursuant to section 350, subdivision (c), for a finding that the Agency had failed to meet its burden of proof. The court denied the motion based on the fact that visitation had not progressed beyond therapeutic supervised visits.[15]

Prior to closing arguments, the court commented that it had not heard any objection to the services provided to parents by the Agency. Indeed, when ruling on the section 350 motion, the court asked the parties if there was an issue with reasonable efforts. Neither party raised any issue/objection regarding the services provided to parents by the Agency. The court recessed the matter to the following day.

The next day, with all parties in attendance, the juvenile court determined that returning the minor to her parents would create a substantial risk of detriment. In making this finding, the court stated: "All right. So I find preponderance of the evidence[,] that return of the child to physical custody of the parents would create a substantial risk of detriment. I don't find that the participation in the case order plan which they have participated in have reached the level where I can say that there is a substantial probability — may be substantial probability that the child will be returned in the next six months and twelve months would be the outside period. I look at the evidence in total including the issues that were involved with the other children, and I also looked at the duration in time in which it took to reach this point of intervention.

"So I find [the minor] a child under three-years of age, I find by clear and convincing evidence that reasonable services were offered. I don't believe there is any evidence to the contrary. I will not say in this six-month period parents failed to participate but there was issues that arose during the course of it and so I find that they did

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[15] Based on the description in the record, "therapeutic supervised" visitation involves the supervisor coaching the parents to develop specific positive parental behaviors and to eliminate negative parental behaviors. Supervised visitation requires that visits be monitored. Unsupervised visitation refers to parent/child visits that are not directly monitored by the Agency.

not make substantive progress in the case plan. I don't find that [the minor] may be returned within six months, substantial probability. [¶] I'm going to set this matter also for a .26 hearing. I'll set it at the same date for the other children. . . ."

The juvenile court terminated services and set the matter for a section 366.26 hearing on September 23, 2015.

On May 26 and 29, 2015, M.L. and S.L. respectively filed timely notices of intent to file writ petitions. After this court granted a motion for augmentation and a motion for an extension of time, both petitions were filed on July 10, 2015. We issued an order to show cause on July 13, 2015 and the Agency filed a timely opposition. No party requested oral argument, which is, thus, deemed waived. On September 18, 2015 we stayed the section 366.26 hearing below.

DISCUSSION

M.L. challenges the juvenile court's order terminating services and setting a section 326.26 hearing on multiple grounds. He contends that (1) he was not provided reasonable services, (2) the juvenile court improperly applied the "sibling group standard" when it terminated parents services, (3) the juvenile court improperly found that there was no substantial probability of return, (4) the juvenile court failed to comply with ICWA, and (5) the April addendum report was substantively inadequate and the Agency's failure to timely serve it on the parties mandated reversal of the court's findings. S.L. adopts several of M.L.'s arguments; in particular, she contends that the court improperly applied the "sibling group standard" in making its findings and failed to comply with ICWA. In addition, S.L. advances several arguments independent of those raised by M.L. She contends that (1) the juvenile court's detriment finding was not supported by substantial evidence, (2) the juvenile court erred when it determined that S.L. had not participated regularly or made substantial progress in her treatment plan, (3) the Agency failed to provide her with reasonable services when it improperly delegated the decision as to when parents could transition from therapeutic visitation to unsupervised visitation to the service provider and based upon the Agency's failure to refer her for weekly psychiatric appointments. Last, she argues that the juvenile court's finding of no substantial

probability of returning the minor to parents by the 12-month review was unsupported by the evidence.

The governing legal standards pertaining to our review of the parents' challenge to the juvenile court's findings are well established. Due to the special needs of infants and toddlers for permanency and stability, court-ordered services for children who are younger than three years old are presumptively limited to six months from when the child enters foster care. (§ 361.5, subd. (a)(3); *Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018, 1027.) The juvenile court must order the return of a child to his parents at the six-month review hearing unless the court finds that doing so would create a "substantial risk of detriment to the safety, protection or physical or emotional well-being of the child." (§ 366.21, subd. (e).) A parent's failure "to participate regularly and make substantive progress in court ordered treatment programs" is prima facie evidence that return would be detrimental. (*Ibid.*) If a parent does not make substantive progress in court-ordered treatment programs the juvenile court may set a section 366.26 hearing and terminate reunification services. (*Fabian*, *supra*, at p. 1027.) If, however, the court finds there is a substantial probability that the child may be returned to her parent at or before the 12-month permanency hearing or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency planning hearing. (*Ibid*.)

We review the juvenile court's findings for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.) In reviewing the findings for substantial evidence, we review the record in the light most favorable to the juvenile court's findings and draw all reasonable inferences in support thereof. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 46.) The court does not reweigh the evidence or exercise independent judgment, it simply determines whether the record discloses sufficient facts to support the findings. (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 689, citing *In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) Where the law requires that a fact be proven by clear and convincing evidence, the sufficiency of such evidence to meet that burden is primarily a question of fact for the trial

court. (*Sheila S. v. Superior Court* (2000) 84 Cal App.4th 872, 880-881, citing *Crail v. Blakely* (1973) 8 Cal.3d 744, 750.)

With these standards in mind we turn now to address the contentions raised in the parents' writ petitions.

I. The Reasonable Services Claims.

Parents contend that the Agency failed to provide them with reasonable services, a predicate requirement to the setting of a section 326. 26 hearing. In particular, the parents assert that the Agency improperly delegated the decision to "step down" visitation from therapeutic to supervised and unsupervised visitation to the therapeutic visitation service provider, who was not an Agency employee. Moreover, mother contends that she was denied reasonable services as a result of the Agency's failure to refer her for psychiatric appointments. In addition, father contends that the "restrictions placed on parents with regard to attendance at visits was onerous and unreasonable." He argues that the Agency required them to arrive at the visitation center two hours prior to visits. If they were fifteen minutes late, even though they arrived well before the scheduled visit, visitation was cancelled. Under these circumstances, where the parents substantially complied with the time frame specified by the Agency, M.L. argues the Agency's failure to be more flexible was unreasonable.

As noted above, the juvenile court specifically inquired of parents, before closing arguments, whether they contended that the Agency had failed to provide reasonable services. At the conclusion of the parties closing arguments, the juvenile court addressed the parties again and noted that no party had argued that the Agency failed to provide reasonable services to parents. The juvenile court then found by clear and convincing evidence that reasonable services had been offered, noting the lack of any argument or evidence to the contrary. Accordingly, the parents' claim that reasonable services were not

provided is waived. (See *Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [issues raised for the first time on appeal, which were not litigated below, are waived].)[16]

Moreover, assuming that this issue had been preserved for our review, we would conclude that substantial evidence supports the court's finding that reasonable services were provided to parents. An agency need not provide optimal services — merely reasonable services. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) It must "make a good faith effort to develop and implement a family reunification plan . . . [with] the objective of providing such services . . . as will lead to the resumption of a normal family relationship." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 424.) In general, the juvenile court must ensure that regular visitation occurs, while at the same time providing for flexibility in response to needs of the child and family circumstances. (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1229.) However, the juvenile court may delegate to the probation officer or social worker the responsibility to manage the details of visitation, including the time, place and manner thereof. (*In re Moriah T.*(1994) 23 Cal.App.4th 1367, 1375-1376.) Moreover, the effectiveness of the plan, including visitation, depends, in part, on the resources and flexibility of the particular supervising agency. (*Id*. at p. 1376.) Here, the record is clear that the Agency exercised its responsibility to manage the details of parents visitation, including the time, place and manner thereof. For example, the August 26, 2014 (file-stamped) disposition report reflects the Agency's initial decision that the parents have separate visits due to domestic violence concerns. In response to the parents' request to have joint visitation, the Agency granted their request and arranged for joint visits with the children. On another occasion, S.L. spoke with the Agency's Protective Services Worker, requesting individual visits, who then made the necessary arrangements.

In an email, dated March 12, 2015, the therapeutic visitation supervisor solicited the Agency worker's feedback regarding M.L.'s involvement in the visits. The email reflects that the determination as to M.L.'s presence and participation in visits was subject to the

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[16] Furthermore, the orders, filed December 10, 2014, were not timely appealed, which is an additional reason the arguments are now waived. (See *Julie M.* (1999) 69 Cal.App.4th 41, 47.)

social worker's oversight and discretion. The March email specifically solicits the social worker's feedback concerning M.L.'s participation in the visits, saying that he had done fine in the past, and likely would do fine in the future, but the service provider "wanted to leave it up to [the Agency social worker] whether he is involved." The record reflects several additional email communications between the visitation service provider and the Agency worker to ensure that parents attended scheduled visitation and that the visits were conducted in an appropriate manner. In one email, the visitation service provider addresses the worker's concern about inappropriate discussions during the sessions. In that same email, the visitation service provider responds to an issue that was raised concerning missed sessions and their physical locations. The visitation supervisor also suggests criteria he would use to measure the family's success. The context of the letter makes clear that, in doing so, he advised the Agency of his opinion, in order to facilitate the social worker's decision. These communications are evidence that the service provider was giving the Agency essential information in an attempt to facilitate the parents visitation with the minor. In short, this evidence demonstrates the close consultation between the Agency worker and the therapeutic visitation supervisor, in which the Agency was the final decision maker regarding the time, place, and manner of the visitation.

We also reject M.L.'s complaint that the restrictions placed on the parental visits were unreasonable. The visits often were associated with anxiety and aggressive behaviors by the older children. All three of the older children were dealing with visit-related issues in their therapies. The caregiver noticed that when the visits were cancelled or a parent simply did not show up, the children became disappointed, sad, and angry. Between January 24 and March 14, 2015, one or both of the parents were unavailable, cancelled or failed to confirm a scheduled visit four times. Thus, given the distances involved in transporting the children for visits and the frequent cancellations/no-shows by the parents, it was reasonable to require that parents arrive at the visitation site early enough to ensure that visitation would occur before raising the children's expectations that they would soon see their parents.

Finally, S.L. complains that she received inadequate services because one of the recommendations from her psychological evaluation was that she attend weekly psychiatric visits. Agency, according to mother, failed to provide that service. Relying on *In re K.C.* (2012) 212 Cal.App.4th 323, S.L. contends that the agency's failure to provide her with weekly psychiatric visits precludes a finding that she was afforded services necessary to facilitate reunification.

In re K.C., supra, 212 Cal.App.4th 323, sets out the basic standard an agency must meet when providing reunification services. There, the appellate court required that the agency make a good faith effort to provide reasonable reunification services which are responsive to the particular needs of the family. (*Id*. at p. 329.) Specifically, it must identify the problems leading to the loss of custody, offer services designed to remedy those problems, maintain reasonable contact with the parents during the duration of the service plan, and make reasonable efforts to assist the parents when compliance is difficult. (*Id*. at pp. 329-330.) The adequacy of the plan and the agency's efforts are judged according to the specific circumstances of an individual case. (*Id*. at p. 329.) In *In re K.C.,* as here, the parent had a psychological evaluation which identified particular conditions, and a further medication evaluation was ordered. (*Ibid*.) However, in *K.C., after an initial and unsuccessful referral of the parent to* a public mental health clinic the agency made no further attempt to secure the evaluation. (*Ibid*.) We find *In re K.C.* inapposite. Here, unlike in *In re K.C.*, the Agency attempted to and did find alternative sources of mental health assistance for mother.

As stated above, mother was suffering from mental illness at the time the minor was removed from her custody. The Agency's detention report reflects that S.L. was referred to Bay View Mental Health Services for on-going medication evaluation, but she declined services. With the concurrence of S.L. and her counsel, the Agency referred her for a psychological evaluation in July 2014. Faced with delay in obtaining the evaluation, the Agency referred S.L. to Westside Community Services for a drop-in assessment and medication evaluation. S.L. denied any mental health problems when she went to Westside and, accordingly she did not receive any services. On August 28, 2014 the court

ordered S.L. to undergo a psychological evaluation and, if indicated, undergo a medication evaluation. At the November disposition hearing, the court made a similar order. In December 2014 and January 2015, S.L. moved to Sacramento — a location outside of the Agency's service area. It was not until her second involuntary commitment in January 2015, some three months before the Agency petitioned the court to set a section 366.26 hearing, that she agreed to take psychotropic medication. Mother acknowledges, as she must, that the Agency referred her to a drop-in medication clinic by August 2014, but she denied that she had any mental health needs. Moreover, the juvenile court did not order that S.L. have weekly psychiatric visits. Rather, it mandated that she see either a qualified mental health professional or a psychiatrist and the Agency arranged for weekly psychotherapy for her. An agency is only required to provide services that are reasonable under the circumstances. (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1426.) Here, the Agency arranged for weekly psychotherapy for mother and repeatedly attempted to have S.L. evaluated for medication; S.L. resisted those efforts and impeded the Agency's attempt to provide her with mental health services when she moved out of the Agency's jurisdiction for a period of time. On this record, we conclude that the Agency's provision of mental health services and treatment were reasonable under the circumstances.

II. The Juvenile Court Did Not Apply the "Sibling Group" Standard.

M.L. and S.L. contend that the juvenile court erred when it applied the sibling group standard "to the facts of this case." Without specifying the particular findings wherein the juvenile court erroneously applied the sibling standard, the parents argue that record fails to support application of the standard. We reject parents assertion based on our review of the record.

A sibling group is two or more children who are full or half-siblings. (§ 361.5, subd. (a)(1)(C).) When a child is a member of a sibling group, the report and recommendation may take into account specified factors such as whether the sibling group was removed from parental care as a group, the closeness of the sibling bond, the ages of the siblings, the appropriateness of maintaining them together, the detriment to the child if

sibling ties are not maintained, the likelihood of finding a permanent home for the sibling group, and the best interests of each child in the sibling group. (§ 366.21, subds. (c) & (e).) The parents contend that the juvenile court relied solely on father's statement that the children wished to stay together to support the findings related to the March 15th order setting a permanency planning hearing. Indeed, the juvenile court did acknowledge that the family wanted the children to stay together and that the concurrent plan seems to allow for that. However contrary to the parents' assertion, the trial court did not rely on the sibling group standard as the basis for any of the findings related to the court's May 2015 order. To the contrary, the juvenile court's March order regarding the minor was based on its finding, by a preponderance of the evidence, that returning her to her parents' physical custody would create a substantial risk of detriment and its determination that parents' failure to make progress in their court ordered treatment plan supported a finding that there was no substantial probability that the minor could be returned to parents in the next six-to-twelve months. The juvenile court relied upon the evidence adduced at the hearing including the agency's provision of services to parents with respect to their older children and the length of time it took the parents to achieve the progress described at the May 2015 six-month review hearing. Furthermore, the Agency presented no argument to the court that minor and her older siblings should be treated as a unitary sibling group. Although the May 2015 evidentiary hearing dealt with all the children's cases, the court was careful to rule separately when it decided the minor's case. Thus, we find no support for parents' unsupported contention that the juvenile court improperly applied a "sibling group" standard in this case.

III. Substantial Evidence Supports the Juvenile Court's Finding of Detriment and That Parents Failed to Make Progress In The Court Ordered Treatment Plan.[17]

As stated above, a child must be returned to his parents at the six-month hearing unless the court finds that his return would create a "substantial risk of detriment to the safety, protection or physical or emotional well-being of the child." (§ 366.21, subd. (e).) The parent's failure "to participate regularly and make substantive progress in court ordered treatment programs" is prima facie evidence that returning the child would be detrimental. (*Ibid.*) This logic is premised on the notion that where there is an earlier finding that the child had to be removed from the parent's custody for his well-being, if the parent has not at least made significant progress in remedying the underlying problem(s), the detriment to the child still exists.

Similarly, in determining whether there is a substantial probability of a minor's return to his parents, the court considers several factors including: (1) whether the parent has consistently and regularly contacted and visited the child; (2) *whether the parent has made significant progress in resolving the problems which led to removal*; and (3) whether the parent has demonstrated the capacity and ability to complete the objectives of the treatment plan and provide for the child's safety, protection, physical and emotional health and special needs. (§ 366.21, subd. (g)(3).) If the juvenile court finds by clear and convincing evidence that the parent did not participate regularly and make substantive

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[17] With respect to both parents, the juvenile court found that returning minor to her parents would create a substantial risk of detriment, that the parents failed to make "substantive progress" in their case plans, and that there was not a "substantial probability" of returning the child to her parents within the next six months. S.L. argues that there was not substantial evidence to support the juvenile court's finding that returning the child to her would create a substantial risk of detriment to the Minor. She also argues that there was not substantial evidence to support the finding that she failed to participate regularly in or make substantive progress in her court-ordered treatment. Both parents contend that the juvenile court erred in concluding that there was not a substantial probability that the child could be returned to their care within four months following the six-month review hearing. Because, in this case, these findings by the juvenile court are all based on the parents' participation and progress in their case plans, for efficiency's sake, we deal with them together.

progress in the case plan, the court "may" schedule a section 366.26 hearing. (§ 366.21, subd. (e).) Ultimately, the juvenile court must determine whether, if reunification services were to continue, family reunification within the statutory period was "sufficiently probable." (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 848.) In doing so, the court must also consider the amount of time left in the statutory period between the six-month review hearing and the 12-month anniversary of the minor's entrance into foster care. (See *Tonya M., supra,* at p. 846.) Thus, the progress, or lack thereof, a parent makes in achieving the goals of the case plan is key to determining both whether the immediate return of the child would be detrimental and to whether it is sufficiently likely that he can soon be safely returned to his parents.

Here the record supports the juvenile court's findings that returning the child would create a substantial probability of detriment to the child and that it was not substantially probable that the minor would be returned to parents before the date for the 12-month hearing due to parents' failure to make sufficient progress in their case plans. The parents had a lengthy reunification period with the older children, and received additional services with respect to the minor but evidenced progress in meeting the case plan only just prior to the six-month review hearing. Mother failed to engage resources provided by the Agency to assist her in dealing with her mental health issues — denying her need for medication. In addition, parents were unable to refrain from participation in episodes of domestic violence. We acknowledge, as we must, that after her second involuntary hospitalization in January 2015, mother began taking her psychotropic medications and her mental health issues seem to have stabilized. The juvenile court referred to parents' belated progress as parents' "epiphanies" and acknowledged that "they each had a sudden and profound understanding concerning their respective issues."[18] However, the juvenile court commented that these breakthroughs came very late in the family reunification process and, if they were truly to be turning points, parents needed a "long road" of work to

[18] With respect to S.L. the court was referring to her mental breakdown which resulted in the involuntary hospitalizations. With respect to M.L., the court referred to his arrest for a violent crime, causing him to assess his sobriety.

solidify the parents' recent gains. The juvenile court also focused specifically on parents' visitation with minor finding that parents were "still at the infancy of dealing with those issues." For example, the juvenile court noted in the "couple of months" before March 12, 2015, there had only been two visits with the children. As of March 12, 2015, the visitation supervisor reported that there had only been two completed visitation sessions. The January 24 session was cancelled due to their non-availability. The February 7, March 21, and March 28 sessions were cancelled because transportation was unable to transport the children. The February 21 session had been cancelled due to mother's claim that she lacked the necessary travel funds. The February 18, 28 and March 14 sessions were cancelled because mother and/or both parents did not confirm the appointment, as they had previously agreed to do. Thus, in the eight-week period between January 24 and March 14, the weekly visitation was cancelled four times due to the parents' acts or omissions. Critically, the court indicated that parents had not yet mastered basic parenting skills, which would have allowed them to progress from therapeutic to supervised visitation.[19] Parents' failure to progress to supervised visits, much less to unsupervised visits — which, apparently, were not yet even contemplated by the Agency — is substantial evidence in support of the juvenile court's finding.

M.L. also failed to make substantial progress on his substance abuse and personal therapy issues. On July 2, 2014 he declined the opportunity to attend Alcoholics Anonymous. On July 14, he again rejected the suggestion that he enter an alcohol and drug detoxification center. On August 28, 2014, he was ordered to participate in outpatient treatment. He had previously had a mental health evaluation and had been in weekly therapy. However, he then cancelled "for non-specific reasons," but started up again for three sessions in August and September 2014. After his incarceration, he regularly

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[19] Social worker Blair Roe's notations on the therapeutic visit documentation forms from visits in March, April, and May indicate that basic parenting skills such as engaging the child in positive ways, not using threatening language, and use of positive parenting skills had not been achieved — but were only "in progress." Thus, the parents' failure to master these skills served as the basis for the recommendation that parents were not ready to progress to the lower level of "supervised visitation."

attended therapy for five weeks — up until his therapist wrote a letter describing his progress. The therapist described him as being "in early abstinence from alcohol abuse" and "a constant sense of anxiety mixed with fear of losing his family should he relapse to abusing alcohol or fail to complete the requirements put on him by [the Agency]."

These facts, viewed in the light most favorable to the trial court's determination, provide substantial evidence to support the trial court's finding of detriment and parents' failure to make progress toward achieving the goals of her case plan.

We also reject parents contention that the trial court erred in finding that that there was not a substantial probability that the minor would be returned to their care by the twelve-month hearing. In challenging the juvenile court's finding here, both parents point to their comparatively recent gains in achieving their case goals. M.L. emphasizes that he had completed a parenting class, was attending couples therapy, and was attending AA meetings. Similarly, S.L. relies on evidence establishing that she was no longer delusional, had completed her domestic violence courses, and was involved in couple's counseling. She contends that "all she needed to do was establish a 'track record' to demonstrate that the changes she had effected were permanent."

Having reviewed the record we find ample support for the court's finding that return of the minor to the care of her parents was not substantially probable by the 12-month review hearing. Parents had not consistently and regularly visited the minor; neither were they proficient in basic parenting skills. Less than two months before the review hearing, S.L. requested help because she felt threatened by M.L. In addition, S.L. had a history of failing to take her medications on a consistent basis and M.L. had a history of denying his substance abuse problem, and M.L. had only recently begun his individual therapy, was still suffering dysphoria, and was only in the early stages of recovery. Given M.L.'s failure to abstain from the use of alcohol, the couple's continued embroilment in, and denial of, episodes of domestic violence, and S.L.'s past denial of her need for mental health counseling and psychotropic medication, the court was entitled to consider their lack of a significant track record in assessing the likelihood that the child could be returned to them in the four months before the 12-month hearing. The juvenile court specifically

noted the "long road" they still had before consolidating their recent gains. Thus, the court's finding that there was not a substantial probability of returning the child to her parents' custody within the statutory period is supported by substantial evidence.

IV. Any ICWA Error was Harmless.

M.L., joined by S.L., argues that juvenile court failed to comply with ICWA notice requirements because the relevant tribes were not timely notified of the dependency and the juvenile court never made a finding as to whether ICWA was applicable to this proceeding. The juvenile court has a sua sponte and continuing duty to assure compliance with ICWA notice requirements. (*In re H.A.* (2002) 103 Cal.App.4th 1206.) Here the notification was apparently delayed because neither parent initially claimed ICWA status. As of the filing of the addendum report on October 7, 2014, the Agency continued to believe that ICWA was not applicable. The first indication that ICWA might be applicable in this case occurred on October 9, 2014, when S.L. filed a parental notification of Indian status form. On December 22, 2014 the court sent the appropriate notices to three branches of Cherokee Indians and to the Bureau of Indian Affairs. All three Cherokee branches responded that the minor is neither a member nor eligible to register as a member of their tribes.

We agree with parents that there is nothing in the record before us documenting that the juvenile court found that ICWA does not apply. However, the failure of the juvenile court to make such a finding was harmless error. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414 [despite juvenile court's obligation to determine the applicability of ICWA, its failure to do so when the facts clearly demonstrate the inapplicability of ICWA is harmless error].) The responses from the tribes all indicated that ICWA is not applicable in this case and the tribes responses were all received before the May 19-20, 2015 six-month review hearing. The appropriate remedy upon a finding of a violation of ICWA's notice requirement would be to remand to the juvenile court for ICWA compliance. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 188.) However, ICWA's purpose would not be served by a remand to the juvenile court as there is no

evidence at all that the minor is an Indian; thus, any error in failing to timely comply with ICWA's notice requirement was harmless on this record.

V. The Claims Concerning The Addendum Report Are Waived.

M.L. contends that the March 2015 addendum report is "woefully deficient and undeniably failed to meet the requirements of the rules of court for such reports," which he claims constitutes per se reversible error. Because this claim was not raised in the juvenile court, we will not consider it now. (See *Newton v. Clemmons* (2003) 110 Cal.App.4th 1, 11.) Furthermore, although M.L.'s petition decries the woeful deficiencies of the report, he fails to identify the substantive deficiencies of which he complains. Thus, even if the issue were not waived, there is an insufficient foundation for us to consider it. (*Estate of Randall* (1924) 194 Cal. 725, 728-729.)

M.L.'s argument fails on the merits as well. California Rules of Court, rule 5.708(c) sets forth the specific subjects that a status report must address: (1) recommendations for the court order and the reasons for those recommendations; (2) a description of what was done to achieve legal permanence for the child if reunification fails; and (3) a factual discussion of items specified in specific statutes. (Cal. Rules of Court, rule 5.708(c)(1).) The April 2015 addendum report explicitly states that it is an addendum to the March 2015 report submitted by the Agency in support of its 388 petition and that it is simply providing the court with "updated information." After an extensive discussion of the current situation, the addendum report clearly indicates that the Agency's recommendation to terminate services remains unchanged, and discusses the Agency's rationale for requesting that the court terminate reunification services and setting of a .26 hearing. We are unable to discern the substantive deficiency of which M.L. complains and M.L. does not direct our attention to any such deficiency. Accordingly, we reject M.L.'s contention that the April addendum report fails to comply with the California Rules of Court.

M.L. also contends that the Agency failed to provide an adequate report, at least 10 days prior to the hearing, in violation of parents' due process rights.[20] (See Cal. Rules of Court, rule 5.708(c)(2).) The Agency social worker testified at the May 19 hearing that she filed the report on April 29, more than 10 days in advance of the May 19 hearing. M.L. provides no evidence to refute the social worker's testimony that the report was timely filed. Furthermore, in his factual summary of the case M.L. neither argues nor cites any evidence to indicate that the report was not timely filed. He simply notes that the report was not contained in the original appellate record, but that the juvenile court relied on it, and that he filed a stipulated motion to augment to include the report in this case. In addition, the parents were permitted to cross-examine the worker on the contents of the report and failed to lodge any objection when the Agency moved for the admission of the report. Thus, we find no basis to reverse the juvenile court's findings on this ground.

DISPOSITION

The petitions for an extraordinary writ are denied. The September 18, 2015 stay we issued is dissolved. To expedite the prompt resolution of this case, our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

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[20] M.L.'s petition does not specify whether he is complaining that he did not timely receive the original report prepared for the March 2015 hearing or the updated addendum report. He describes the requirements the report must meet and claims there was a failure to provide "such a report." He makes this claim, however, in the section of his petition discussing the alleged inadequacies of the addendum report.